

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

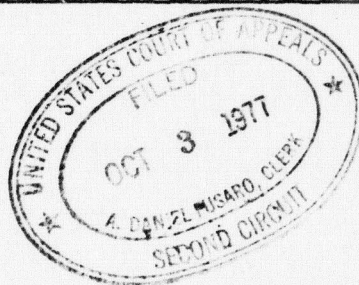
77-1121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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: UNITED STATES OF AMERICA, :
: Plaintiff-Appellee, :
: -against- :
: GLEN THOMAS BEVERLY and :
: FAON DE JESUS RODRIGUEZ, :
: Defendants-Appellants. :
: -----X

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PPS
Docket No. 77-1121

PETITION FOR REHEARING
FOR APPELLANT BEVERLY
WITH SUGGESTION FOR REHEARING EN BANC



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Docket No. 77-1121

PETITION FOR REHEARING
FOR APPELLANT BEVERLY
WITH SUGGESTION FOR REHEARING EN BANC

Appellant Glen Thomas Beverly seeks rehearing with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment of a panel of this Court (Mulligan, Gurfein, and VanGraafeiland, C.JJ.)* dated September 19, 1977. The judgment affirmed a judgment of conviction rendered by the United States District Court for the Eastern District of New York (Pratt, D.J.) for

*A copy of the opinion is annexed hereto as Appendix A.

conspiracy to distribute cocaine (21 U.S.C. §846) and possession with intent to distribute (21 U.S.C. §841(a)(1); 18 U.S.C. §2), as well as distribution of, cocaine (21 U.S.C. §841(a)(1); 18 U.S.C. §2).

The principal issue raised on the appeal was whether appellant Beverly was entitled to a charge on the lesser included offense of simple possession, in violation of 21 U.S.C. §844, as well as an instruction on entrapment.

Appellant Glen Thomas Beverly and his brother-in-law, Faon De Jesus Rodriguez, were indicted for unlawful distribution of four ounces of cocaine on November 4, 1975, and March 3, 1976; for possession of the drugs with intent to distribute on those dates; and for conspiracy to distribute cocaine between November 1975 and March 1976. Appellant Beverly was subsequently convicted of the conspiracy count in addition to the possession and distribution counts involved in the March 3 transaction.* He was acquitted of the two counts relating to the November 4 transaction.

A. The Government's Case

The prosecution's case rested largely upon the testimony of Robert Gonsieski, an unindicted co-conspirator. On November 4, 1975, Gonsieski had sold four ounces of cocaine to Michael Kane, an agent of the Drug Enforcement Administration

*Co-defendant Rodriguez was convicted of the conspiracy count and was acquitted of all the substantive counts.

("DEA") (1.55*). On February 24, 1976, Kane arrested Gonsieski for the sale. Realizing that he faced a possible sentence of 45 years, Gonsieski immediately agreed to cooperate, and named appellant Beverly and co-defendant Rodriguez as his source of cocaine in the November transaction, and agreed to set up a deal which the Government agents could observe (1.74, 46, 64).

In addition to mainlining heroin and cocaine and using a variety of other drugs, the 23-year old Gonsieski had sold cocaine between 30 and 50 times (1.88, 98). Gonsieski had first sold drugs when he was 16 years old, and appellant Beverly had supplied the marijuana on that occasion (1.96-97). Years later, while enrolled at New York Community College, Gonsieski learned from friends that Beverly was dealing in cocaine. Beverly began supplying Gonsieski with the drug in May or June 1975 (1.49-50).

The Government agents were unable to verify any of Gonsieski's information regarding the defendants other than such personal data as their addresses (2.19). On March 2, 1976, Gonsieski met with co-defendant Rodriguez to set up the drug transaction and, on the following day, he informed the agents that the transaction was set for that afternoon. Appellant Beverly (whom the agents had never seen before) was observed leaving his home with a brown paper bag, waving to co-defendant

*Page references to the trial minutes of December 20, 1976, are preceded by "1"; of December 21, 1976, by "2"; and of December 22, 1976, by "3".

Rodriguez, and driving around the block several times. Appellant Beverly parked his van behind Gonsieski's car and carried the bag to the informer's vehicle. Gonsieski signalled the agents, who arrested appellant* and seized the bag, which contained four ounces of cocaine (2.23, 98).

After his arrest, appellant Beverly agreed to cooperate and informed a federal agent that the papers found in his possession were codes of prior transactions (2.116). The statement was never reduced to writing, and the agent's report did not mention either the agreement to cooperate or the drug codes (2.134, 136, 139).

B. The Defense

Appellant Beverly, testifying in his own defense, gave a different version of the events than had Gonsieski. The two agreed, however, that they had known each other for about six years and had been friendly at one time. Beverly testified that the two had recently argued when Gonsieski appeared, uninvited and intoxicated, at Beverly's wedding (2.160, 163). Appellant Beverly had known of Gonsieski's trafficking in drugs and had frequently urged him to cease these activities. Beverly had never supplied Gonsieski with narcotics or served as his contact in such dealings (2.163, 164, 165, 166). Nor did appel-

*Co-defendant Rodriguez was arrested at approximately the same time. He was walking westward from his (and Beverly's) home at 751 Glenmore Avenue, which was several blocks from the scene of Beverly's arrest (2.158).

lant ever use cocaine (2.190).

On the morning of March 3, Gonsieski called Beverly to ask for help in repairing his car. When appellant Beverly and co-defendant Rodriguez arrived at Gonsieski's house, the latter told them that he had sent the car to a repair shop (2.167, 168, 169). Appellant Beverly asked Gonsieski to help him get a job at the cab company where he worked. Gonsieski agreed to do so, but asked Beverly to do him a favor and hold onto a quantity of cocaine and papers that he had had to remove from his car. Gonsieski was afraid that his aunt would find them in the house and report him to the police (2.169, 170, 171). Beverly hesitantly agreed, and when he followed Gonsieski's directions for the return of the drugs,* he was arrested (2.171, 173, 174, 176, 177). Appellant Beverly first told the Government agents that he had obtained the drugs from Gonsieski, but when they refused to believe him and threatened him with 30 years' imprisonment, he lied and said that the co-defendant, Rodriguez, had supplied the cocaine (2.179).

C. The Charge

Counsel for appellant Beverly requested the following instruction:

The defendant Beverly contends that the Government informant, Robert Gonsieski, had earlier given him the cocaine which was found

*When Beverly returned the bag of cocaine to Gonsieski, he forgot to return the informer's papers, which appellant had left in the glove compartment of his van (2.176).

on the car seat on March 3, 1976. He asserts that Goncieski had asked him earlier on that day to hold the drugs for him for several hours. Thus Beverly argues (a) that he had no intent to distribute this cocaine; and (b) that he was induced or entrapped into possessing the cocaine by the activity of the informant Goncieski on the morning of March 3rd.

If, after an impartial consideration of the evidence, you find beyond a reasonable doubt that defendant Beverly possessed cocaine on March 3, 1976 with intent to distribute it, you may find him guilty of Count Four.

On the other hand, if you find that he did possess the cocaine, but without any intent to distribute it, you may find defendant Beverly guilty on Count 4 of simple possession.

Title 21, United States Code, §844
Rule 31(c), Federal Rules of Criminal
Proced.

In that event, however, before finding defendant Beverly guilty of simple possession of cocaine on March 3, 1976, you must first find, beyond a reasonable doubt, that he was not entrapped into that possession by the Government informant, Robert Goncieski.

Court Exhibit A, Request #3.*

The Government objected to the requested charge (2.216, 217), and the court refused counsel's request for the following reasons:

With respect to the charge on the lesser included offense as against the Defendant Beverly and entrapment, both in relation to the March 3rd, '76 charge, which is Count Four, I believe, I have decided I will not give that

*The remainder of Request #3 was a standard entrapment instruction.

charge. And the reason of my thinking on that, so that the record will be clear, is that the only evidence that points in that direction is the testimony of the Defendant Beverly.

If the jury believes that testimony, then they should find him not guilty on Count Four as well as on Count Five. And providing the lesser included offense, together with a defense of entrapment, which tags onto the lesser included offense, not only will unnecessarily encumber the problems which I will be presenting to the jury, but it's simply not warranted by the evidence.

If they believe Beverly's testimony, he is entitled to be acquitted as far as March 3rd is concerned.

(3.8).

Judge Pratt noted further that "there is no basis on which the jury could find him [appellant Beverly] guilty only of possession without also finding entrapment being present" (3.10).

The court offered to instruct the jurors that

... if they do believe Beverly, then they must acquit. In fact, I would charge as to both defendants they must acquit on both counts four and five.

I would also charge them they would have to, even if they don't believe precisely what Beverly had to say, they would have to find the elements based on the other testimony, including Goncieski, beyond a reasonable doubt.

(3.11-12).

The defense attorney refused the offer because "that kind of charge would give to the jury the impression that somehow the burden is on the defendant to convince them that what he said is the way it happened" (3.12). Counsel took exception to the

court's ruling, "particularly with respect to the decision not to charge the lesser included" (3.13; see also 3.137 (exception following the charge)). The court thus charged neither the lesser included offense nor the defense of entrapment.

D. Verdict and Sentence

The jury found appellant Beverly guilty of possession with intent to distribute cocaine and the distribution of cocaine on March 3, 1976, and of conspiracy to distribute cocaine. He was acquitted of the possession with intent to distribute and distribution counts relating to the November 4 transaction. Co-defendant Rodriguez was convicted of the conspiracy count and acquitted of the four substantive counts (3.157).

On March 2, 1977, Judge Pratt sentenced appellant Beverly under the Youth Corrections Act, pursuant to 18 U.S.C. §5010(b).*

On September 19, 1977, this Court affirmed the judgment of the district court in an opinion which found that "the defendant could not have been rationally convicted of simple possession because the only evidence that would have supported a conviction on that offense also established entrapment as a matter of law." Slip op. at 6046-6047.

*The court additionally imposed a special parole term of three years. Following a Rule 35 motion, Judge Pratt vacated the parole term.

ARGUMENT

APPELLANT BEVERLY WAS ENTITLED TO A CHARGE ON THE LESSER-INCLUDED OFFENSE OF SIMPLE POSSESSION, IN VIOLATION OF 21 U.S.C. §844, AS WELL AS AN INSTRUCTION ON ENTRAPMENT.

Appellant Beverly testified that at the time of his arrest he was not transferring cocaine to Gonsieski, but was merely returning the drugs the informer had asked him to hold. Appellant asserted that he had never engaged in drug trafficking and that he only possessed cocaine on March 3 because the informer had induced him to do so. On appeal, appellant argued that, based on this evidence, he was entitled to a charge on the lesser-included offense of simple possession, in violation of 21 U.S.C. §844, and to an instruction on entrapment, both of which the trial court refused to deliver.

This Court affirmed the judgment of the district court in an opinion which found that "the defendant could not have been rationally convicted of simple possession because the only evidence that would have supported a conviction on that offense also established entrapment as a matter of law." The decision is erroneous because it fails to consider crucial testimony.

It is undisputed that simple possession of cocaine is a lesser-included offense of possession with intent to distribute and distribution of cocaine. This Court, however, concludes that appellant was not entitled to submission of the lesser

charge because Beverly's testimony, in addition to establishing the lesser offense, also established entrapment as a matter of law. The premise for this conclusion is that, although Beverly's testimony established inducement by a Government agent, "the prosecution failed to establish sufficiently Beverly's predisposition to commit the crime." This is incorrect because it ignores the significant evidence of predisposition in the record. The informer testified that appellant had begun supplying him with drugs seven years earlier, when Beverly sold him marijuana (1.96-97). Moreover, six months before the beginning of the conspiracy charged in the indictment, Gonsieski learned from friends that appellant Beverly was dealing in cocaine. In May or June 1975, Beverly began selling the drug to Gonsieski (1.49-50). Clearly, this testimony of the informer was sufficient proof of predisposition to support a verdict by reasonable jurors. See United States v. Steinberg, 551 F.2d 510, 514 (2d Cir. 1977); United States v. Esquer-Gamez, 550 F.2d 1231, 1234 (9th Cir. 1977); United States v. Licursi, 525 F.2d 1164 (2d Cir. 1975); United States v. Ortiz, 496 F.2d 705 (2d Cir. 1974).

Appellant Beverly's testimony that he had never previously possessed cocaine or engaged in the drug trade met the requirement of producing "any evidence negating propensity, whether in cross-examination or otherwise, [which] requires submission [of the entrapment defense] to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be."

United States v. Riley, 363 F.2d 955, 959 (2d Cir. 1966).

The jury could rationally have believed that portion of Beverly's account which established the crime of simple possession of narcotics, while rejecting his claim that he was not predisposed to possess drugs. Courts have recognized that the jurors do "not have to credit [a defendant's] entire story in order to believe any part of it." United States v. Edwards, 488 F.2d 1154, 1158 (5th Cir. 1974); see Broughman v. United States, 361 F.2d 71, 72-73 (D.C. Cir. 1966).

The instruction requested by counsel was not a "hybrid," but merely provided a legal framework for the facts as related by Beverly. See United States v. Howard, 433 F.2d 505, 511 (D.C. Cir. 1970). The court's proffered instruction was not rejected "for reasons relating to trial tactics," but because it "would give the jury the impression that somehow the burden is on the defendant to convince them that what he said is the way it happened" (3.12). Such instructions, which cast "the jury's ultimate determination in terms of a mere credibility choice between the informer and appellant," have been deemed erroneous. United States v. Oquendo, 490 F.2d 161, 165 (5th Cir. 1974); see United States v. Guest, 514 F.2d 777, 779-780 (1st Cir. 1975); see also United States v. Booz, 451 F.2d 719 (2d Cir. 1971). The defense did not lose its right to an instruction on the lesser-included offense simply because Beverly also had a viable entrapment defense. This Court's finding that Beverly's testimony established entrapment as a matter of

law is erroneous for it ignores the informant's testimony concerning appellant's predisposition. The evidence presents a jury issue on the question of entrapment, and that defense should have been charged along with an instruction on the lesser-included offense.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted for appellant Beverly.

Respectfully submitted,

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BARRY BASSIS,
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October 3, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1374, 1375—September Term, 1976.

(Argued June 24, 1977 Decided September 19, 1977.)

Docket Nos. 77-1121, 77-1198

UNITED STATES OF AMERICA,

Appellee,

—against—

GLEN THOMAS BEVERLY and
FAON DE JESUS RODRIGUEZ,

Appellants.

Before:

MULLIGAN, GURFEIN and VAN GRAAFEILAND,

Circuit Judges.

Both defendants appeal from judgments of conviction for violations of 21 U.S.C. § 846. Appellant Beverly also appeals from judgments of conviction for violations of 21 U.S.C. § 841(a)(1).

Affirmed as to Beverly; Rodriguez remanded solely for correction of sentence pursuant to 18 U.S.C. § 5010(b), affirmed in all other respects.

ZACHARY W. CARTER, Assistant United States
Attorney (David G. Trager, United States
Attorney for the Eastern District of New

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York, Alvin A. Schall, Assistant United States Attorney, of Counsel), *for Appellee.*

BARRY BASSIS, Legal Aid Society, New York, New York (William J. Gallagher, Legal Aid Society, New York, New York, of Counsel), *for Appellant Beverly.*

STANLEY S. ZINNER, New York, New York, *for Appellant Rodriguez.*

MULLIGAN, *Circuit Judge:*

Defendants Glen Thomas Beverly and Faon De Jesus Rodriguez appeal from judgments of conviction for violations of federal narcotics laws entered on March 2, 1977 in the United States District Court for the Eastern District of New York, after a jury trial before the Hon. George C. Pratt, *District Judge.* Appellants were charged in a five count indictment with conspiring to distribute and to possess with intent to distribute cocaine between November, 1975 and March, 1976 in violation of 21 U.S.C. § 846, Count One; with the substantive offenses of distributing and of possessing with intent to distribute cocaine on November 4, 1975, Counts Two and Three; and on March 3, 1976, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, Counts Four and Five. Both Rodriguez and Beverly were convicted of the conspiracy charged in Count One. In addition, Beverly was convicted of the substantive charges, Counts Four and Five. The defendants were acquitted of the charges contained in the remaining counts.

Beverly was sentenced to treatment and supervision under the Youth Corrections Act, 18 U.S.C. § 5010(b), on each count, to run concurrently, and to a special parole term of three years. Judge Pratt in an order filed on April 20, 1977 vacated the special parole portion of Beverly's

sentence. Rodriguez was also sentenced to treatment and supervision under the Youth Corrections Act and to a special three-year parole term.

We remand Rodriguez's case to the district court solely for vacation of the special three-year parole term so that his sentence may comply with the provisions of 18 U.S.C. § 5010(b). The Government has not contested this disposition. Appellants' convictions are affirmed in all other respects.

I

The major Government witness in this case was Robert Goncieski who was named as a co-conspirator in the indictment but was allowed to plead guilty to the charge of using a communications facility in furtherance of the commission of a drug offense. In early November, 1975, Goncieski agreed to sell four ounces of cocaine to Michael Kane who was an agent of the Drug Enforcement Agency. The transaction was consummated at a parking lot in the John F. Kennedy International Airport on November 4, 1975. Beverly and Rodriguez were the suppliers of the drugs to Goncieski and observed the sale from a parked car at the airport. They gave Goncieski a small share of the proceeds.

Kane later attempted to obtain more cocaine from Goncieski but Rodriguez was suspicious of Kane and refused to supply any more drugs. On February 24, 1976 Kane arrested Goncieski who cooperated, advising the D.E.A. that the source of the prior sale to Kane, which had been observed by other agents, had been the defendants Beverly and Rodriguez. Goncieski at the request of the D.E.A. sought more cocaine from the defendants, not identifying Kane as the prospective purchaser. The second sale took place on March 3, 1976. The D.E.A., alerted by Goncieski, kept the defendants under surveillance and arrested Bev-

erly as he was passing a bag of cocaine to Goncieski. A search revealed additional cocaine on Beverly's person. Rodriguez was arrested later after Beverly identified him as the source of the drug.

At the trial, Beverly testified and admitted delivering the cocaine to Goncieski on March 3, 1976. However, he offered a rather improbable explanation of the transaction. According to Beverly, Goncieski had called him early on the morning of March 3 to ask for his help in repairing Goncieski's car. Beverly, accompanied by Rodriguez, proceeded to Goncieski's apartment only to find that the car had been towed away. Goncieski then said that he had been using the car to hide drugs and that he did not wish to keep them in his apartment where his aunt might find them. Beverly agreed to take possession of the drugs for a few hours as a favor for Goncieski. When they met later that morning so that the cocaine could be returned to Goncieski, the defendant was arrested. His then identification of Rodriguez as the supplier, he explained, was the result of intimidation by the D.E.A. agents. The jury obviously did not accept this version of the facts. Rodriguez did not testify and presented no witnesses.

II

Appellants do not contest the sufficiency of the evidence but raise other points. Appellants urge that Judge Pratt committed reversible error in refusing to give the charge set forth in the margin.¹ This proposed defense charge

¹ The requested defense charge provided in relevant part:

The defendant Beverly contends that the Government informant, Robert Goncieski, had earlier given him the cocaine which was found on the car seat on March 3, 1976. He asserts that Goncieski had asked him earlier on that day to hold the drugs for him for several hours. Thus Beverly argues (a) that he had no intent to distribute this cocaine; and (b) that he was induced or entrapped

required the trial court to give a hybrid instruction combining within the single charge instructions on the lesser included offense of simple possession, 21 U.S.C. § 844,² and entrapment with respect to that offense. No request was made for an instruction on entrapment on either the offense of possession with intent to distribute or the offense of distribution. Judge Pratt denied this requested charge. The trial court reasoned that if the jury believed Beverly's testimony that he was only holding the cocaine as a favor for Goncieski then they could not convict on the counts under 21 U.S.C. § 841(a)(1) since the requisite intent would not be present. In that situation he also concluded that entrapment on the simple possession count would have been established as a matter of law. Since, under his analysis, the jury in no event could convict Beverly of simple possession, Judge Pratt refused to instruct them on it. Instead, the court offered to instruct the jury that

if they do believe Beverly, then they must acquit. In fact, I would charge as to both defendants they must acquit on both counts four and five.

into possessing the cocaine by the activity of the informant Goncieski on the morning of March 3rd.

If, after an impartial consideration of the evidence, you find beyond a reasonable doubt that defendant Beverly possessed cocaine on March 3, 1976 with intent to distribute it, you may find him guilty of Count Four.

On the other hand, if you find that he did possess the cocaine, but without any intent to distribute it, you may find defendant Beverly guilty on Count 4 of simple possession.

Title 21, United States Code, §844

Rule 31(c). Federal Rules of Criminal Proced.

In that event, however, before finding defendant Beverly guilty of simple possession of cocaine on March 3, 1976, you must first find, beyond a reasonable doubt, that he was not entrapped into that possession by the Government informant, Robert Goncieski.

² 21 U.S.C. § 844 is a lesser included offense of 21 U.S.C. § 841(a)(1). *United States v. Swiderski*, 548 F.2d 445, 452 (2d Cir. 1977).

I would also charge them they would have to, even if they don't believe precisely what Beverly had to say, they would have to find the elements based on the other testimony, including Goncieski, beyond a reasonable doubt.

Defense counsel for reasons related to trial tactics rejected the court's proposed charge.

A defendant is entitled to a lesser included offense charge only if the evidence would permit a jury rationally to find him guilty of the lesser offense but not guilty of the greater. *Keeble v. United States*, 412 U.S. 205, 208 (1973). Here the defendant admitted possession of cocaine; the element in dispute was his intention with respect to the drug. If Beverly's testimony was believed, not only could he not be convicted of either possession with intent to distribute or of distribution, but he also could not be found guilty of simple possession because, as the trial court found as a matter of law, on those facts he would have been entrapped into committing that crime. Therefore, under *Keeble v. United States*, *supra*, the instruction on the lesser included offense was not to be given since no jury rationally could have found Beverly guilty of committing the crime of simple possession.

Judge Pratt could properly determine that if the jury believed Beverly, entrapment on the simple possession count was established as a matter of law. The defendant's testimony clearly established the inducement by a government agent to take possession of the cocaine; the prosecution failed to establish sufficiently Beverly's predisposition to commit the crime. Compare *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) with *Sherman v. United States*, 356 U.S. 369, 372-73 (1958). Under the unique circumstances of this case, we find that the defendant could not have been rationally convicted of simple possession because

the only evidence that would have supported a conviction on that offense also established entrapment as a matter of law. Thus Judge Pratt correctly refused the requested instruction.

Beverly also attacks as unduly prejudicial to the defense the court's instructions to the jury on the consideration to be given the interests of a defendant and of an accomplice in weighing their respective testimony. We find that the charge on informant testimony met the requirement "that the trial judge should call the jury's attention to their duty to scrutinize the testimony of accomplices and informers." *United States v. Swiderski*, 539 F.2d 854, 860 (2d Cir. 1976). The balance here between the instructions on accomplice and on defendant testimony is similar to that upheld in *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966). We conclude that Judge Pratt's cautionary instructions on Beverly and Goncieski's testimony were eminently fair and proper.

Beverly also urges that the convictions on Count Four for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and Count Five for distribution of cocaine in violation of the same statutory provision merge. Thus, he argues, the judgment of conviction and sentence on Count Four must be vacated and the case remanded for resentencing.

This Circuit has never decided whether a conviction under 21 U.S.C. § 841(a)(1) for possession of cocaine with intent to distribute merged with a conviction under the identical statutory section for distribution of the same cocaine. However, as in *United States v. Vasquez*, 468 F.2d 565 (2d Cir. 1972), cert. denied, 401 U.S. 945 (1973) we find no need to reach this issue since Beverly was sentenced concurrently on both Counts Four and Five. See *United States v. Gaines*, 460 F.2d 176, 179-80 (2d Cir.), cert. denied, 409 U.S. 883 (1972).

Appellant Rodriguez contends that this court must vacate his conviction on the conspiracy count, 21 U.S.C. § 846, because it is inconsistent with Judge Pratt's instructions to the jury on that count. He asserts that the trial court charged the jury that it could not return a guilty verdict on the conspiracy count unless it found Rodriguez guilty of one of the substantive counts. In essence, the appellant's argument is based on the premise that an acquittal on the charges of possession with intent to distribute, of distribution, and of aiding and abetting the commission of these offenses is factually inconsistent with a finding of guilt on a count of conspiracy to commit these offenses. There is no authority to support appellant's argument; indeed, the law is to the contrary. *United States v. Zane*, 495 F.2d 683, 690 (2d Cir.), cert. denied, 419 U.S. 895 (1974). A conviction on Count One was not necessarily inconsistent with acquittal on the substantive counts since there were other overt acts, included in the indictment and proved, to support that conviction. Nor did Judge Pratt charge that a finding of guilt on one of the substantive counts was necessary to return a guilty verdict on the conspiracy count. In any event, we find appellant's argument meritless and totally unsupported by both the facts and the law.

The Government agrees with Rodriguez that the three-year special parole term is in conflict with the Youth Corrections Act. We remand Rodriguez's case solely for the purpose of vacating the special parole term. The convictions appealed from are affirmed.

CERTIFICATE OF SERVICE

October 3, 1977

I certify that a copy of this petition for rehearing for appellant Glen Thomas Beverly with suggestion for rehearing en banc has been mailed to the U.S. Attorney for the Eastern District of New York.

Barry Bassie

